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No. 89-1717

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF FLORIDA,

Petitioner,

vs.

TERRANCE BOSTICK,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

MAY THE POLICE, WITHOUT VIOLATING THE FOURTH AMENDMENT, BOARD AN INTERSTATE BUS AND ASK FOR, AND RECEIVE, CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE?

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 554 So.2d 1153 (Fla. 1989).

The opinion of the District Court of Appeal, Fourth District of Florida, is reported at 510 So.2d 321 (Fla. 4th DCA 1987).

The trial court's order denying the motion to suppress filed by Bostick is not reported (JA 1).

JURISDICTION

The Supreme Court of Florida issued its opinion on November 30, 1989, and denied rehearing on January 29, 1990. On April 26, 1990, Florida filed a petition for writ of certiorari, which this court granted on October 9, 1990. This court has jurisdiction. 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, *United States Constitution,* provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...

Amendment XIV, Section 1, *United States Constitution,* provides in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law...

Article I, Section 12, *Florida Constitution,* provides:

> The right of the people to be secure in their persons, houses, papers and effects against the unreasonable interception of private communication by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The following facts were adduced at the hearing on the motion to suppress evidence: Officer Joseph Nutt of the Broward County Sheriff's Office testified that on August 27, 1985, he and Officer Steven Rubino boarded a Greyhound Bus while it was stopped at the Fort Lauderdale station. This action was part of their daily duties in checking for narcotics violations. (JA 8,12). Officer Nutt proceeded to the back of the bus, where he saw Bostick resting on a red bag. (JA 9). The officer, in a normal conversational tone of voice, identified himself as a police officer. (JA 8-9,10,14). He asked Bostick where he was travelling to. Bostick replied that he was going to Atlanta. Officer Nutt then asked to see Bostick's ticket and identification. These were reviewed and returned to Bostick. (JA 9-10,15). At that point, the officer asked Bostick if the "red bag" was his. Appellant replied that it was. Officer Nutt asked Bostick if he consented to a search of the bag, and Bostick replied "Okay, go ahead." (JA 18). The red bag did not contain contraband, and was returned to its true owner, Bryan Williams, later. (JA 10).

Officer Nutt testified that his partner, Officer Rubino, noticed a bag in the overhead rack, and asked Bostick if it was his. When Bostick answered in the affirmative, Officer Nutt asked Bostick if the bag could be searched for drugs. (JA 9). Bostick again said, "Okay, go ahead." (JA 18-19). The search of this blue bag produced the cocaine, and Bostick was placed under arrest. (JA 9).

Officer Nutt testified that he and his partner were wearing plain clothes on that date, but were also wearing green windbreakers which had patches with sheriff's insignia. (JA 8,17). Officer Nutt also stated that he carried his police firearm in a hand carried pouch, which remained zipped throughout the contact with Bostick. (JA 8,13). Neither officer blocked or otherwise impeded Bostick from getting off the bus. (JA 11)

Officer Rubino also testified that they were wearing green windbreakers with sheriff's insignia. (JA 21). He confirmed that Officer Nutt carried his firearm in a zipped up pouch, which was not unzipped prior to approaching Bostick. (JA 27). Officer Rubino testified that he observed Officer Nutt explain to Bostick, in a normal tone of voice, that they were police officers, and what their duties were. Rubino heard Nutt ask Bostick for permission to search the red bag, and Bostick gave his consent. (JA 22-23,32). Officer Rubino quoted how he asked Bostick for permission to search the blue bag: "[c]an I have permission to search that for drugs, too? You have the right to refuse." (JA 19). Rubino stated that Bostick was free to go, there was no intimidation, no show of force against Bostick, and his path was not blocked. (JA 23). Bostick was in the last seat on the driver's side, with Officer Rubino standing in front of the seat in front of Bostick, and Officer Nutt was next to him, half on the seat and half in the aisle. (JA 21,30).

Terrance Bostick testified that he boarded the bus in Miami to go to Atlanta. (JA 33). When the bus arrived in Fort Lauderdale, he was laying in the back seat, trying to get some sleep. He had borrowed a bag from another passenger, as he had "no bag." (JA 34). Bostick stated the officers did not identify themselves as police officers until they looked at his "identification and everything." (JA 37). However, Bostick knew they were police officers immediately upon seeing them. (JA 47). Bostick confirmed that the officers were using a normal tone of voice, and that no threats were used on him. (JA 43). He never saw a gun, but he recognized the pouch as one containing a firearm. (JA 36-37,39). Bostick testified that the officer asked to see his ticket and identification, and he showed them to him. (JA 34-35). The officer asked him if the red bag was his, and he said "yes." The officer asked for permission to search the bag, and Williams said "yes, sure." (JA 35). Bostick stated that at no time did he tell the officers that the red bag belonged

to Bryan Williams. (JA 43). Bostick also acknowledged ownership of the blue bag. (JA 44). However, he stated that when asked for permission to search the blue bag, he "didn't quote (sic) anything." (JA 36). Bostick never asked the officers to not search the bag, and did not object to the search. (JA 44).

On these facts, the trial court denied the motion to suppress evidence. (JA 1). Appellant pled to trafficking in cocaine,[1] reserving the right to appeal the motion to suppress. The District Court of Appeal, Fourth District of Florida, per curiam affirmed the denial of the motion to suppress, and certified the following question to the Supreme Court of Florida:

> May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

There was one partial dissent from the holding. *Bostick v. State,* 510 So.2d 321 (Fla. 4th DCA 1987). *Bostick* was one of six cases from two distinct prosecution districts decided by the District Court, all of which were reviewed by the Supreme Court of Florida.[2] The District Court reviewed one case, *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988), *en banc,* and held that the granting of the motion to suppress by the trial court should be reversed. The court took *Avery en banc* because it considered "the issue to be of exceptional importance." *Id.,* 531 So.2d at 184. Although the District Court treated *Avery* as the lead case, the Supreme Court of

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1 In violation of § 893.135(1)(b)(3), *Fla. Stat.* (1985).

2 *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988), *en banc,* reversed *Avery v. State,* 555 So.2d 1160 (Fla. 1989); *Mendez v. State,* 534 So.2d 774 (Fla. 4th DCA), reversed 554 So.2d 1161 (Fla. 1989); *McBride v. State,* 535 So.2d 652 (Fla. 4th DCA), reversed 554 So.2d 774 (Fla. 1989); *Serpa v. State,* 541 So.2d 799 (Fla. 4th DCA), reversed 555 So.2d 1210 (Fla. 1989); *Shaw v. State,* 543 So.2d 469 (Fla. 4th DCA), reversed 555 So.2d 351 (Fla. 1989).

Florida focused on *Bostick* instead. The court summarily reversed each case based on *Bostick,* without consideration of the factual variations in each scenario.

The Supreme Court of Florida rephrased the certified question as follows:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

In a four to three decision, the court answered the question in the affirmative, and quashed the lower court opinion. *Bostick v. State,* 554 So.2d 1153 (Fla. 1989). In so holding, the Supreme Court of Florida rejected the state's position that the initial contact between Officers Nutt and Rubino and Bostick did not rise to the level of a stop or detention which would implicate Bostick's fourth amendment rights, and that the encounter was consensual and voluntary. Instead, the majority opinion found that Bostick was "seized" at the time the officers approached Bostick. 554 So.2d at 1156-1157. The court concluded that a reasonable person would not have felt that he was free to leave during the encounter. 554 So.2d at 1157. The court further found that Bostick's subsequent consent did not overcome the taint of the illegal seizure. 554 So.2d at 1158.

The dissent articulated the controlling test as "whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances." 554 So.2d at 1159. The dissent answered that question affirmatively, and found that the consent to search was voluntary. In so doing, the dissenters deferred to the trial court's factual finding that the consent was voluntarily given. *Id.* at 1160.

SUMMARY OF THE ARGUMENT

Whether or not Bostick was the subject of a fourth amendment seizure by Officers Nutt and Rubino must be determined by an assessment of the totality of the circumstances. If there was no improper seizure, then Bostick's consent to search his bag should be considered to have been voluntarily given. A seizure is generally determined to have occurred if a reasonable person believed he was not free to leave. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

A review of the facts in the case at bar mandates a finding that there was no seizure of Bostick. No weapons were displayed. The officers were wearing plain clothes, with windbreakers identifying them as sheriff's officers. The officers used a normal tone of voice. When the officers requested that Bostick consent to a search of his bag, he was told that he had the right to refuse his consent. Bostick's identification and bus ticket were not retained by the officers. The officers did not block the aisle of the bus. No coercion was used. These facts show that Bostick was only part of an encounter. Therefore, the fourth amendment was not implicated, and Bostick's consent was voluntarily made.

The Supreme Court of Florida's decision expressly conflicts with decisions of the Circuit Courts of Appeals for the Fourth and Eleventh Circuits, as well as with a North Carolina court of appeal decision. Florida asserts that these other decisions are correctly decided and that unless reversed, the decision of the Supreme Court of Florida will undermine reasonable and necessary government efforts aimed at curtailing narcotic trafficking.

ARGUMENT

The Supreme Court of Florida erred by holding that Bostick was the subject of a "seizure" within the meaning of the fourth amendment of the *United States Constitution.* Viewing the situation under a totality of the circumstances test, Bostick was not the subject of a seizure, and the consent to search his luggage was voluntarily made. Florida suggests that the question presented be answered in the affirmative.

This court has consistently held that an assessment as to whether police conduct amounts to a seizure implicating the fourth amendment, and whether consent to search is voluntary, must take into account all the circumstances surrounding the incident. There is a seizure only if a reasonable person would not feel that he was free to leave. *Michigan v. Chesternut,* 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The government has the burden of showing that there was no seizure and that consent was voluntary. *United States v. Mendenhall; United States v. Blake,* 888 F.2d 795 (11th Cir. 1989). Inquiry must be made on a case by case basis. *United States v. Blake; Schneckloth v. Bustamonte.* However, a trial court's factual findings as to whether there was a voluntary consent to search may be disturbed on appeal only if they are clearly erroneous. *United States v. Blake.* The Supreme Court of Florida misapplied these principles. The state trial court found that Bostick's consent was voluntarily given. This ruling was improperly ignored by the Supreme Court of Florida, which revisited the facts and made its own factual conclusions.

Officer Rubino and Nutt approached Bostick who was lying down on the last seat of a Greyhound bus. (JA 9). They

identified themselves as sheriff's deputies whose task was to investigate narcotics trafficking in South Florida. (JA 8-9,10,14). They asked for Bostick's identification and bus ticket, which were reviewed and quickly given back to him. (JA 9-10,15). *Advising Bostick that he had a right to refuse permission to search his bag,* the officers requested his cooperation in allowing a search. (JA 18-19,22-23,32). The officer's tone of voice was conversational. (JA 9,23). Bostick consented to the search of the "red bag", which did not belong to him, and to the search of the "blue bag" which did belong to him. (JA 18-19). The search of the blue bag resulted in the seizure of the cocaine, and Bostick's arrest. (JA 9). The officers displayed no weapons. (JA 8,13,27). They were in plain clothes, with green windbreakers which identified them as sheriff's officers. (JA 8,17,21). The officers did not block the aisle, and they stated that Bostick was free to leave. (JA 11,23).

This court has found that an initial contact between a police officer and a person in an airport was not a seizure, and did not implicate the fourth amendment, when the police officer simply asked the person if he would step aside and talk with him. *Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984). Similarly, the individual questioning of factory workers as part of a factory survey was a "brief encounter," rather than a seizure, since the manner of questioning would not have resulted in a reasonable fear that the workers were not free to continue working or to move about the factory. *Immigration and Naturalization Service v. Delgado,* 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). Mere questioning relating to a person's identity, and a request to see his identification does not constitute a fourth amendment seizure. *Id.* However, a seizure does occur when police officers stop an individual in an airport, ask to see his airline ticket and driver's license, hold on to the ticket and license while asking the individual to accompany them to a small room in the airport, and

retrieve that individual's luggage without his consent. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The facts in *Royer* contrast sharply with those in the case at bar.

The fourth amendment is designed to prevent the arbitrary and oppressive interference by law enforcement officers with the privacy and personal security of individuals. *Immigration and Naturalization Service v. Delgado.* The actions of Officers Nutt and Rubino did not rise to this level of activity. As discussed above, whether or not Bostick voluntarily consented to the search, or was the subject of a seizure, must be determined upon review of the totality of the circumstances. In meeting its burden of showing voluntary consent, the government does not need to establish that it informed a person of his right to refuse consent to search his luggage. *Schneckloth v. Bustamonte.* Nonetheless, proof that a person had the knowledge that he had the right to refuse a search is "highly relevant" to a determination as to whether there has been voluntary consent. *United States v. Mendenhall.* The United States Court of Appeals for the Fifth Circuit has held that, in the context of airport stops, whether the law enforcement officers informed individuals that they were free to refuse consent to a search, and could contact a lawyer, does not absolutely prove uncoerced consent, but "does in many instances assuage the fear of a court that an individual was intimidated into consent to a search." *United States v. Berry,* 670 F.2d 583, 598-599 (5th Cir. 1982).

The mixed question of whether an individual was the result of a fourth amendment seizure, or voluntarily consented to a search was addressed by this court in *United States v. Mendenhall.* The majority opinion found that Ms. Mendenhall voluntarily accompanied drug enforcement agents to an office in an airport based on the following factors: (a) the woman was not told that she had to go to the office, (b) there were no threats or show of force, (c) the initial

questioning by the agents was brief, and (d) her airline ticket and driver's license were returned to her. *United States v. Mendenhall.* This court also noted that Ms. Mendenhall was informed of her right to refuse the search. *Id.* Justices Stewart and Rehnquist, in their concurring opinion, found that there was no seizure because there was no record support for the conclusion that Ms. Mendenhall had any objective reason to believe that she was not free to end her conversation with the drug agents and proceed on her way. *Id.*, 446 U.S. at 555, (Stewart and Rehnquist, JJ. concurring). This principle has been applied by several Circuit Courts of Appeals to facts very similar to those in the present case, and the courts have found that there was no seizure, and that there was voluntary consent. Florida urges the same result here.

The Eleventh Circuit Court of Appeals, in a case also arising out of Broward County, Florida, found that the defendant was not seized[3] although he was the subject of police attention on a bus. *United States v. Hammock,* 860 F.2d 390 (11th Cir. 1988). The facts in *Hammock* are virtually identical to those in the instant case, except that in *Hammock,* the defendant initiated the conversation with the police officers. Florida asserts that this one fact would not have been the controlling factor in the Eleventh Circuit's finding of voluntariness. A more recent case from the Eleventh Circuit Court of Appeals, again under similar facts, also resulted in the conclusion that there was no seizure, and voluntary consent. *United States v. Fields,* 909 F.2d 470 (11th Cir. 1990). In *Fields,* the Eleventh Circuit (which includes Florida in its jurisdiction) specifically rejected *Bostick,* stating: "[t]hese thoughtful opinions[4] disturb us,

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3 The court uses the term "arrest" throughout the opinion, but the authorities cited therein discuss seizure.

4 *Bostick v. State,* 554 So.2d 1153 (Fla. 1989); *United States v. Lewis,* 728 F.Supp 784 (D.D.C. 1990).

and we note, as Fields urges, that they impose almost a blanket prohibition on drug interdiction efforts such as the one at issue here." *Id.,* 909 F.2d at 473. In *Fields,* the facts were even more in the defendant's favor, since there was evidence that the police officer briefly retained the defendant's ticket. *Id.,* 909 F.2d at 474 n.1. The Fourth Circuit Court of Appeals has also upheld the voluntariness of a search conducted under similar facts on a bus. *United States v. Flowers,* 912 F.2d 707 (4th Cir. 1990). The North Carolina court of appeal also addressed a similar case, and found that consent "could not be more freely given." *North Carolina v. Christie,* 385 S.E.2d 181, 185 (N.C. Ct. App. 1989). That court noted that the law enforcement officers did not act more intrusively than necessary in pursuit of their goal of drug interdiction by boarding the bus. *Id.*

The Circuit Court of Appeals for the District of Columbia has found that an encounter between police officers and a train passenger, where one police officer opened the door to the passenger's roomette, identified himself, and asked permission to ask the passenger questions, was not a search or seizure, even though three police officers stood in the doorway and aisle of the train. The court held that these actions would not have prevented a reasonable person from feeling that he was free to end the encounter. *United States v. Tavolucci,* 895 F.2d 1423 (D.C. Cir. 1990). *See also, United States v. Carrasquillo,* 877 F.2d 73, 76 (D.C. Cir. 1989). Certainly, if citizen contact on a train is a mere "encounter," similar contact on a bus would also be an encounter. A passenger has more of an expectation of privacy in a train roomette than a bus seat. *United States v. Tavolucci* at 1425.

The bright line rule set forth by the Supreme Court of Florida that a citizen encounter made on a bus automatically rises to the level of a seizure, frustrates the legally necessary totality of the circumstances and case by case analysis. Certainly some encounters on a bus do constitute

a seizure.[5] Some of the circumstances which may weigh an analysis in favor of finding that there was a seizure were set forth by the Eleventh Circuit Court of Appeals in *Hammock:* the blocking of an individual's path, the retention of a ticket or identification, an officer's statement that the individual is the subject of an investigation, or that a truly innocent person would cooperate with the law enforcement officer, the display of weapons, the number of officers present and their demeanor, the length of the detention, and the extent to which the officer restrained the individual. *United States v. Hammock,* 860 F.2d at 393.

Applying these criteria to the encounter between Officers Nutt and Rubino with Bostick mandates a finding that there was no seizure, and that his resultant consent was voluntarily made. The mere fact that the encounter took place on a bus does not require a finding of per se coercion, as was found by the majority of the Supreme Court of Florida. The majority opinion does not even address how the trial court's finding of voluntary consent could have been clearly erroneous. The dissenting opinion of the Supreme Court of Florida properly found that the controlling question was whether a reasonable person in Bostick's position would have felt that he was free to terminate the encounter, and go about his business. Florida asserts that the answer to this question must be that a reasonable person would have felt that he had a choice of whether to talk with the officers or not. The test could be stated as whether a person would have been so intimidated by the police conduct that he felt compelled to answer the officer's questions. *See United States v. Tavolucci; United States v. Savage,* 889 F.2d 1113 (D.C. Cir. 1989). Bostick would not have had to leave the bus to terminate the conversation. He merely had to say no when

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5 Indeed, one of the companion cases to *Bostick* resulted in a finding by the trial court that a seizure had resulted. This ruling was overturned by the district court, and reinstated by the Supreme Court of Florida. *State v. Avery; Avery v. State.*

the officers asked him for consent to search his bag. Had Bostick declined the conversation, the officers would have moved on, or faced certain application of the exclusionary rule. The totality of the circumstances do not suggest coercion, and the denial of the motion to suppress by the trial court and the implicit factual findings made thereby that the consent was voluntary, should have been given due deference by the Supreme Court of Florida.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Florida should be reversed, and this cause remanded to the Florida courts for further proceedings.

Respectfully submitted,

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